

**Prepared Testimony of Philip J. Crowley
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**Before the House of Representatives
Committee on Homeland Security
Subcommittee on
Transportation Security and Infrastructure Protection**

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I am P.J. Crowley. I direct the homeland security program at the Center for American Progress. I am grateful for the opportunity to reflect on the emerging direction of chemical security regulation and its impact on both the public and private sector.

More has been done on this issue in the past 10 months than the previous five years. This is clearly a sign that we now recognize, if belatedly, that chemical security is our most significant infrastructure-related homeland security vulnerability. The framework that is emerging is a reasonable start, but more needs to be done, particularly the need to move as rapidly as possible from an interim chemical security regulatory framework to a permanent program with broader authorities and incentives.

The Department of Homeland Security embraces, and I believe properly so, a risk-based approach. The elements of risk, of course, include threat, vulnerability and consequence. Each element conveys the urgency that we must proceed aggressively and we must do it right.

The threat is real, not hypothetical. The conclusions of the National Intelligence Estimate released last week are sobering. Iraq has become a dangerous laboratory and various technologies and tactics have migrated via veterans of the jihad and the Internet to other fronts. In recent months, we have seen several attacks in Iraq where presumed al Qaeda operatives have used tanker trucks filled with chlorine gas as makeshift weapons. If it is happening there, it can happen here. We also see from the most recent plots in London and Glasgow that individuals will use ingredients they have at hand against familiar targets that can create both immediate destruction as well as broader economic ripple effects.

Our vulnerability is clear. The previous emphasis on voluntary steps did not work. Chemical manufacturers, transporters and users were either unable or unwilling to take voluntary steps on a consistent basis to improve security across the varied landscape of the chemical industry. Some made investments in improved security, but as a number of investigative reports have shown, almost six years after 9/11, there are still too many open gates, unsecured rail sidings and accessible storage containers. A HAZMAT rail car moving through a major population center provides everything an urban terrorist could want – a weapon, a delivery system and a target – all in one place.

The potential consequences of an attack employing acutely hazardous materials are well-known and have been for a long time. If successfully attacked, the expected injuries and loss of life would dwarf what occurred on 9/11. The generic chlorine tank explosion that DHS envisioned in its 2004 planning scenarios involved 17,500 fatalities, 10,000 severe injuries and 100,000 hospitalizations. The EPA's Risk Management Program or RMP data identifies more than 500 facilities that, if attacked, place at least 100,000 people at risk and almost 7,000 facilities that put at least 1,000 people at risk.

This is the security environment within which we can evaluate what is being done now and where we must go from here.

I want to concentrate my testimony in five areas – the scope of the “top-screen” that DHS is employing in its facility evaluation; the need for DHS in its risk analysis to link chemical facility physical security and rail security as part of a comprehensive threat picture; the overall capacity of DHS to successfully execute its new chemical security authorities; setting an aggressive timeline for implementation of interim chemical security regulations, including lessons learned and gap analysis; and, finally, using this early experience as a springboard to enact a permanent chemical security legislation over the next 12-18 months.

First of all, I support what appears to be a very ambitious top screen process by DHS. The initial effectiveness of the new regulatory framework will depend upon decisions DHS makes based on the top screen. The top screen does involve a lengthy and detailed questionnaire, but informed judgments require as much information and as broad a perspective as possible. The mere fact that DHS will evaluate a wide range of chemical manufacturers and users should serve as an important catalyst for action. The last thing we should do is narrow its impact.

We continue to confront a “business as usual” mindset – that the threat is overstated, that doing what is easy is sufficient, that what we do to improve safety will work for security, that security can be cost-free. Our national security no longer depends just on what the military achieves “over there.” It also depends on individual business judgments made here as well. At a conference a couple of weeks ago, a senior executive of a Fortune 500 company suggested that, while security was important to his corporate leadership today, he could not guarantee that security would remain so tomorrow. This corporate attitude must change. Good security is good business.

At the Center for American Progress, we have produced two research papers on chemical facilities and supply chains. We have documented how some companies in different segments of the chemical industry are gradually adapting their operations. Changes, including the adoption of safer and more secure chemicals and processes, can be achieved at a manageable cost. There is ample evidence from our analysis that such changes can improve industrial efficiency and reduce regulatory and associated costs. However, the results also show that change is not occurring fast enough.¹ The private sector must be prepared to do more.

Second, the real issue is not whether DHS should require a top screen of thousands of entities, but what it will do with the information it gathers during the top screen. The purpose of government regulation is to broadly impact both perception and behavior in order to further a common good. The near-term objective should be to use the limited interim authority that Congress has granted to achieve the maximum possible impact. Federal regulation can promote both improved security and, of importance to the corporate world, can also create a level playing field where everyone in the market must meet specific performance standards.

One way for DHS to use its authority to maximum effect is to take a system-wide approach to chemical security. The focus must be not only physical plant security, but supply chain security as well. We follow such a comprehensive approach with maritime security – a fully integrated focus from the point of manufacture, through foreign ports, onto container ships and then through our domestic ports here in the United States.

However, for various reasons, including jurisdictional issues here in Congress, chemical security and rail security are treated as distinct rather than interrelated challenges. For example, a chemical manufacturer and user in remote areas can improve physical security – gates, guards, lighting, access and storage. A rail operator can closely monitor interchanges and rail yards. But unless DHS establishes a comprehensive threat picture, it may not adequately address a facility’s highest point of risk, which could be a HAZMAT car transporting a toxic-by-inhalation or TIH gas such as anhydrous ammonia, chlorine, sulfur dioxide or hydrogen fluoride on a freight line that moves through a major population center like Washington, D.C.

In fact, while CSX has voluntarily discontinued TIH shipments on one of its lines through the District, there are still such shipments on a second line through Eckington Yards, within two miles of the Capitol. The Capitol was a target on 9/11 and could be again. One way to minimize such a terrorist opportunity is through rerouting. A better way would be for DHS to use its assessment process to encourage a shift to more secure alternatives. Thus, DHS should evaluate risk across a facility’s supply chain, not just on what occurs inside a facility’s fence line.

Third, we must ensure that DHS has the capacity to properly implement its new authorities. This is an open question. In a conference call in April, DHS officials acknowledged that implementation would be handled by a staff of 33 people at headquarters and 40 field representatives, despite the fact that DHS anticipated that its top screen could impact several thousand chemical facilities. A few dozen employees will likely not enable DHS to exercise appropriate leadership and oversight. Recall that the Coast Guard, one of the largest entities within the Department, struggled with implementation of the Maritime Transportation Security Act even when it used the Coast Guard Auxiliary to review port facility security plans.

An industry of third-party auditors is expected to help with enactment, compliance and enforcement. Clear lines must be drawn regarding functions that must be performed by government personnel and those that can reasonably be delegated to the private sector. Congress should pay close attention to the resources that are being provided to this function. Even if the primary compliance function is assumed by the private sector, DHS must have sufficient capabilities to do its own independent assessment of facilities that pose significant risks.

In fairness to the private sector, government regulation is supposed to create a process whereby all stakeholders identify risk in light of the threat we face, evaluate a range of solutions and take appropriate actions that can both deter attacks and minimize

the impact of any attack that does occur. It is not for the government to dictate solutions, but to encourage action and innovation by those who know the plant or the function best. What the private sector has a right to expect is a full government partner that sets clear standards, is responsive to complex situations that will inevitably arise and creates and maintains a level playing field by enforcing them across the entire sector. DHS cannot watch this unfold from the bleachers. It must be in the game and directly engaged with the private sector, particularly with respect to those facilities in the top security tiers.

Fourth, we have to maintain a sense of urgency about this issue. We are behind. Former EPA Administrator Christine Todd Whitman and former Homeland Security Advisor and later Secretary Ridge were poised to act in 2002 under the new National Strategy for Homeland Security to require roughly 15,000 chemical facilities near major population centers to undertake vulnerability assessments, address those vulnerabilities and report actions taken to the federal government. The White House blocked action. Had appropriate steps been taken then, we would already have a mature and permanent structure in place.

I mention this not as partisan criticism, but to urge that we act aggressively now. DHS should establish an expeditious timeline as to when it expects the facility tiering process to be completed; vulnerability assessments reviewed; security plans validated; and lessons learned evaluated. This is obviously of vital importance since DHS will be undergoing its first presidential transition in late 2008 and there is a need for continuity since it will be the next administration that will be responsible for implementing permanent chemical security rules. I would recommend that DHS provide Congress with a report on interim regulation implementation within the next 15 months, including recommendations for a permanent chemical security framework.

Chemical security should remain a leading priority for Congress over the next two years. Without question, Congress should pass legislation by early 2009 that establishes permanent federal regulation of chemical facilities. A good model is the comprehensive legislation that fully implemented the recommendations of the 9/11 Commission, passed by the House in the first hours of the 110th Congress.

In this legislation, besides making chemical security regulation permanent, Congress should close a gaping hole that exists now and broaden DHS' authority, in concert with the EPA, to regulate drinking water and water treatment facilities, which are now exempted. The legislation should expand the focus of existing efforts beyond simply physical security to include transportation. It should also establish material or process substitution as a key component of a successful security program. Knowledgeable employees should be included in planning. The legislation should make clear that federal chemical security regulation is a floor, not a ceiling. Given the growing threat, there is simply no reason that the federal government should preempt states from taking additional measures that can make specific sites even more secure.

For all stakeholders – the federal and state governments and the chemical and rail industries – given the clear threat, vulnerability and consequence of a chemical attack in

this country, the focus should be on how to work collaboratively to do more rather than offering reasons to do less.

I look forward to your questions.

¹ See Paul Orum, Toxic Trains and the Terrorist Threat, How Water Utilities Can Get Chlorine Gas Off the Rails and Out of American Communities, Center for American Progress , April 2007, available at http://www.americanprogress.org/issues/2007/04/chemical_security_report.html. And Paul Orum, Preventing Toxic Terrorism, How Some Chemical Facilities are Removing Danger to American Communities, Center for American Progress, April 2006, available at http://www.americanprogress.org/issues/2006/04/b681085_ct2556757.html.